[H-125]

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-165

JAMES DOUGLAS MCMILLEN,

Petitioner,

— *vs.* —

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	2
Statement of the Case	2
ARGUMENT — The petitioner does not request relief within the jurisdiction of this Court. His petition is frivolous and without merit and should be denied	4
CONCLUSION — The petition for a writ of mandamus should be denied	6

APPENDIX

Statutes:	
New York Executive Law Sec. 63(12)	A1
New York Civil Practice Law and Rules Sec. 5531(a)	A2
New York Civil Practice Law and Rules Sec. 5701(a)(1)	A3
Decision by New York State Supreme Court Appellate Division, Third Department, in *Matter of Louis J. Lefkowitz* v. *James D. McMillen and Therapeutic Hypnosis, Inc.*	A4
Order by New York State Court of Appeals denying petitioner's motion for leave to appeal in *Matter of Louis J. Lefkowitz* v. *James D. McMillen and Therapeutic Hypnosis, Inc.*	A6

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Opinions Below

There is no ruling by a court below which petitioner seeks to review directly in his petition. Petitioner has, however, made similar applications for writs of mandamus to two courts below.

Petitioner first applied for a writ of mandamus from the New York State Supreme Court, Albany County. This application was denied by that Court (WILLIAMS, J.) on the grounds that petitioner was barred by the doctrine of *res judicata* from litigating questions that he had already litigated in an action in the United States District Court for the Northern District of New York. Petitioner took no appeal from that judgment dismissing his petition.*

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*Decision is set forth in the Appendix to this brief.

The petitioner then applied directly to the United States Court of Appeals for the Second Circuit for a writ of mandamus. That Court denied petitioner's application.

Question Presented

Is there jurisdiction to grant a writ of mandamus, where the writ is not sought as ancillary relief and where the petition does not present a substantial Federal question?

Statement of the Case

Petitioner seeks a writ of mandamus from this Court against the Attorney General of the State of New York requiring the Attorney General to turn certain records over to the petitioner. The records petitioner seeks to have returned were acquired by the Attorney General during an investigation in the discharge of his statutory duties [N.Y. Executive Law Sec. 63 (12)]*. The investigation centered on fraudulent and illegal business activities engaged in by the petitioner and two corporations he was closely associated with. As a result of this investigation, criminal charges were brought against petitioner and a civil proceeding for a permanent injunction was commenced against the petitioner and the two corporations.

The petitioner was acquitted of the criminal charges; but a civil injunction was issued against the petitioner and the two corporations permanently enjoining and restraining them from engaging in fraudulent and criminal business activities in the State of New York*.

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*Text of this section is set forth in the Appendix to this brief.

*The petitioner appealed this injunction to the New York Appellate Division, Third Department, which affirmed (*Lefkowitz* v. *Therapeutic Hypnosis, Inc.*,____ A D 2d____ [May 5, 1977]). (A copy of the decision is annexed in the Appendix.) Petitioner then moved for leave to appeal to the New York Court of Appeals. Petitioner's motion was denied September 1, 1977 (a copy of the order is in the Appendix).

The petitioner also commenced a civil action (pursuant to 42 U.S.C. 1983) in the United States District Court for the Northern District of New York against the Attorney General alleging a violation of his constitutional rights. After four days of trial, a directed verdict was granted by the Court (FOLEY, J.) dismissing the complaint. An appeal by petitioner is pending in the United States Court of Appeals for the Second Circuit.

In March of 1977 the petitioner also commenced a proceeding pursuant to New York Civil Practice Law and Rules, Article 78 against the Attorney General. Among other things, petitioner sought a declaration that a subpoena issued to a Sandra Cadan, an employee of one of petitioner's corporations, in January 1975 was illegal and requiring that the books and records produced by Mrs. Cadan in compliance with the subpoena be returned to petitioner. The Court dismissed the petition holding that petitioner was barred by the doctrine of *res judicata* from relitigating matters already litigated. Petitioner took no appeal from the judgment dismissing this proceeding and his time to appeal has expired*.

The petitioner then filed a petition for a writ of mandamus against the Attorney General with the United States Court of Appeals for the Second Circuit. This petition was summarily denied.

The records that petitioner seeks to have returned are being retained because of the cases which are still open and pending.

The petitioner has been told that these records are available for his use and copying at the Attorney General's office. To date petitioner has not attempted to make use of these records.

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*New York Civil Practice Law and Rules Sec. 5701(a)(1) text of this section is set forth in the Appendix to this brief.

ARGUMENT

THE PETITIONER DOES NOT REQUEST RELIEF WITHIN THE JURISDICTION OF THIS COURT. HIS PETITION IS FRIVOLOUS AND WITHOUT MERIT AND SHOULD BE DENIED.

The petitioner does not request the extraordinary writ of mandamus as ancillary relief to this Court's appellate jurisdiction. The petitioner, rather, seeks this writ as his ultimate relief, thus attempting to invoke the original jurisdiction by this Court. Petitioner, however, does not come within any of the limited areas where this Court's original jurisdiction may be invoked. Accordingly, his petition should be denied.

Moreover, his petition should not be treated as one for a writ of certiorari because the petition does not present an order or judgment from any Court below that is reviewable or warrants review. The judgment by the New York State Supreme Court, Albany County, is not from the highest New York State court in which a decision could be had. Petitioner could have appealed that judgment to the Appellate Division of the New York State Supreme Court, but he did not and his time to appeal has since run*.

The order by the United States Court of Appeals for the Second Circuit denying petitioner's motion for a writ of mandamus does not warrant review. There is no original jurisdiction in the United States Court of Appeals to issue a writ of mandamus. In addition, petitioner's allegations that his property rights have been violated are wholly insubstantial, without merit and frivolous.

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*New York Civil Practice Law and Rules Sec. 5513(a) (set forth in the Appendix to this brief) provides that an appeal must be taken within 30 days from service of the judgment. The judgment was served on petitioner on June 23, 1977.

The records that petitioner seeks to have returned were turned over to the Attorney General's office by the custodian of those records pursuant to a subpoena in the course of an investigation mandated by statute into the fraudulent and illegal business activities of the petitioner.

The information developed from this investigation has resulted in petitioner being enjoined by the Supreme Court of the State of New York from engaging in fraudulent and illegal business practices in the State.

Petitioner has not been denied access to these records, but rather has been told that he may inspect and copy these records. Petitioner has made no attempt to use these records, although he has been in the State of New York several times in the last few months.

Petitioner has also been told that once all litigation is finally terminated and the Attorney General's office has no further need for the records in the Courts they will be returned to the rightful owner.

CONCLUSION

THE PETITION FOR A WRIT OF MANDAMUS SHOULD BE DENIED.

Dated: September 12, 1977

Respectfully submitted,

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APPENDIX

STATUTE – New York Executive Law Sec. 63(12).

New York Executive Law Sec. 63(12)

"12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct.

"In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules."

STATUTE – New York Civil Practice Law and Rules Sec. 5513(a).

New York Civil Practice Law and Rules

"Sec. 5513. Time to take appeal, cross-appeal or move for permission to appeal.

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof."

STATUTE – New York Civil Practice Law and Rules Sec. 5701(a)(1).

"Sec. 5701. Appeals to appellate division from supreme and county courts.

(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:

1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or

* * * "

DECISION by New York State Supreme Court Appellate Division, Third Department, in Matter of Louis J. Lefkowitz v. James D. McMillen and Therapeutic Hypnosis, Inc..

Supreme Court — Appellate Division
Third Judicial Department

May 5, 1977. 30500

In the Matter of LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, Respondent,
v.
JAMES D. McMILLEN, Appellant,
and
THERAPEUTIC HYPNOSIS, INC., et al., Respondents.

Appeal from a judgment of the Supreme Court at Special Term, entered November 21, 1976 in Albany County, which granted summary relief in favor of petitioner.

The nature and factual background of this proceeding is set forth in our decision of a prior appeal in which summary judgment against two corporations and an individual respondent was reversed with leave granted to answer the petition (*Matter of Lefkowitz* v. *Therapeutic Hypnosis*, 52 A D 2d 1017). Such answers were timely served, but Special Term has once again resolved the matter in a summary fashion in petitioner's favor. This time, however, only the individual respondent, James D. McMillen, has appealed from its judgment. We have examined the contentions urged by him and conclude that they lack merit.

CPLR 409 (subd. [b]) requires the court to make a summary determination of a special proceeding to the extent that the pleadings and papers raise no triable issues of fact and the same test and standards used when disposing of a motion for summary judgment in an action apply in resolving that question (*Matter of Javarone [De Rizzo]*, 49 A D 2d 788). Here, the petition and related documentation contained sufficient allegations of fact to merit the relief sought and triable issues

DECISION by New York State Supreme Court Appellate Division, Third Department, in Matter of Louis J. Lefkowitz v. James D. McMillen and Therapeutic Hypnosis, Inc..

were not raised by the general denials of McMillen's answer (see *Iandoli* v. *Lange*, 35 A D 2d 793). We find nothing in the statute mandating that a supporting affidavit be annexed to the answer (CPLR 403, subd. [b]) and, since his was apparently served at least one day before the return date, Special Term incorrectly rejected it as being untimely. Nevertheless, the error in this regard may safely be ignored for it further appears that Special Term did consider the matters stated in that affidavit in arriving at its decision and, in any event, we have fully entertained them without discovering any reason to disturb its ultimate determination. The burden was on McMillen to reveal his proofs and show that his defenses were real and capable of being established. The conclusory assertions recited in that affidavit, even if believable, were simply not enough to meet that burden (*Ehrlich* v. *American Moninger Greenhouse Mfg. Corp.*, 26 N Y 2d 255; *Holdridge* v. *Town of Burlington*, 32 A D 2d 581).

Judgment affirmed, without costs.

KOREMAN, P.J., GREENBLOTT, KANE, MAIN and HERLIHY, JJ., concur.

ORDER by New York State Court of Appeals Denying Petitioner's Motion for Leave to Appeal in Matter of Louis J. Lefkowitz v. James D. McMillen and Therapeutic Hypnosis, Inc. .

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September A. D. 1977

Present, HON. CHARLES D. BREITEL, *Chief Judge*, presiding.

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3 Mo. No. 649
In the Matter of
the Application of the People &c. by Louis J. Lefkowitz, Attorney General of the State of New York, Respondent,
for an Order enjoining and restraining Therapeutic Hypnosis, Inc., James D. McMillen & ors., individually and as incorporators, officers and directors of Therapeutic Hypnosis, Inc., National Institute of Hypnosis Practices, Inc., et al., Appellants,
pursuant to Art. 5, Sec. 63, subd. 12 of the Executive Law, &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

(SEAL)